LIBRARY
SUPREME COURT, U. S.

No. 1355

JUL 2 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

JOSEPH H. DONLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1346

JOSEPH H. DONLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 17, 1967, and a petition for rehearing was denied on March 3, 1967. On April 7, 1967, Mr. Justice Brennan granted petitioner an extension of time to and including May 3, 1967, to file a petition for a writ of certiorari, "without prejudice to the Court's consideration as to whether the application was timely received." The petition was filed on May 3, 1967. However, since the request for an extension was not

received until more than 30 days after the denial of rehearing,[1] the petition is out of time under Rules 22-2 and 34-2 of the Rules of this Court.

In any event, the petition is without merit. After trial by jury, in the District of Delaware, petitioner was convicted of attempting to evade and defeat the excise tax that he owed under 26 U.S.C. 4401 on wagers accepted by him in the month of June 1964 (Count 1) and of failing to register and pay occupational tax imposed by 26 U.S.C. 4411 and 4412 (Counts 2 and 3) (R. 1b-2b).[2] He was given a sentence of one and one-half years on the first count and concurrent one year sentences on the other counts (R. 41a).

1. At the trial, five revenue agents testified to their surveillance of petitioner during the month of June 1964. Petitioner followed a routine which included a series of visits to various locations during the morning and on such visits was observed to deal with slips of paper or money. Although the surveillance was con-

---

[1] The Clerk's files indicate that at 3:34 p.m. on April 3, petitioner sent a telegraphic request for an extension but that the telegram was not received until April 4, 1967. Petitioner asserts that the judgment of the court of appeals was dated and entered on March 29, 1967 (Pet. 2), but what was filed and entered on that date was merely a copy of the original judgment, entered in lieu of a mandate. In his formal motion for an extension, petitioner acknowledged that judgment was entered on his petition for a rehearing on March 3, 1967.

[2] Numbers followed by "b" refer to the government's appendix in the court of appeals. Numbers followed by "a" refer to petitioner's appendix in that court.

ducted during the months of May and June, the court, on petitioner's objection, limited the agents' testimony to the activities observed in June (R. 31b-33b, 34b, 37b).

Documents seized from petitioner pursuant to a search warrant were also introduced in evidence. A revenue agent named Toscano, who had participated in investigations of gambling activities along the entire east coast, testified as an expert that the documents so seized were of the type utilized by bankers in the numbers business as business records and gave his opinion as to the total amount of wagers represented by the notations (R. 11b-24b). On cross-examination, and later when called as a witness for petitioner, it was brought out that Toscano had participated in the surveillance of petitioner, although he had not testified concerning such surveillance on direct examination (R. 12a, 58b).

After the government produced various statements pursuant to 18 U.S.C. 3500, petitioner's counsel stated to the court that he was not satisfied and wanted "all memoranda having anything to do with the investigation and surveillance or anything with regard to the charges that are before us" (R. 35b). After considerable discussion (R. 42b-47b), petitioner indicated that he suspected that the government possessed memoranda by the witnesses reflecting an unsuccessful attempt by an informer named Italiano to place a bet with him by telephone (R. 48b-49b). The government objected that the incident had taken place during May (R. 49b-50b), but nevertheless produced all memoranda and notes relating to the incident to the court

(R. 51b-52b), which, after inspection, ruled that they were not producible (R. 54b). The government also had all of the other May surveillance reports available if the court wished to inspect them, but the court, ruling that only reports made of surveillances during June related to the subject matter of the witnesses' testimony, did not undertake to examine them.

These rulings were clearly justified. There is no support in the record for petitioner's conjecture that the government, despite its express denial (R. 57b), withheld relevant material from the trial court's *in camera* inspection. Since Toscano did not testify to the surveillance of petitioner at all on direct examination, having been called solely as an expert to explain the documents found in petitioner's possession, the district court need not even have examined—although it did—the reports concerning the Italiano incident; on petitioner's own version of the incident it had no relevance to Toscano's testimony. As for the other reports of the government agents concerning their surveillance of petitioner during May, petitioner, having successfully objected to any testimony by government witnesses concerning the surveillance in that month, can hardly claim that any report thereon qualified as a statement "which relates to the subject matter as to which the witness has testified." 18 U.S.C. 3500(b).[3]

---

[3] Unlike *United States* v. *Chapman*, 318 F.2d 912 (C.A. 2), there was no issue in this case as to petitioner's identity that would have made all surveillance reports—even those

2. Two local police officers testified that initials and nicknames listed on the papers seized from petitioner "could represent" certain named individuals whom the officers knew to be numbers writers in the area (R. 3b-11b, 24b-28b). The jury was instructed to consider the witnesses' testimony only in relation to whether the named individuals were known to have engaged in the gambling business in general, and to disregard the witnesses' speculation that the individuals were specifically so engaged during the period charged in the indictment (R. 28a). Petitioner argues that this evidence was too speculative to be admissible. However, the testimony did tend to show that there were numbers writers known to the officers who had such initials or nicknames. As such, it had sufficient "rational connection with the issue" of whether the papers were in fact numbers banker records "to be considered a factor contributing to an answer." *United States* v. *Pugliese*, 153 F.2d 497, 500 (C.A. 2).

---

reflecting surveillances that were not the subject of direct testimony—relevant to testing the accuracy of identification testimony by government witnesses.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[4]

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

JUNE 1967.

[4] Unlike petitioners in *Marchetti* v. *United States*, No. 38, and *Grosso* v. *United States*, No. 181, this Term, petitioner here has not challenged the constitutionality of the wagering tax laws under which he was convicted—or preserved his right to do so by making such a challenge in the courts below.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 264894 937